No. 90-1038 (7)

In The

Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief *Amicus Curiae* of the American Cancer Society, American College of Cardiology, American Heart Association, American Lung Association, American Public Health Association, and Public Citizen In Support of Petitioner

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Cornish F. Hitchcock

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amici*

57p.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Legislative History:

Other Authorities:

No. 90-1038

In The
Supreme Court of the United States
October Term, 1990

THOMAS CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

Brief *Amicus Curiae* of the American Cancer Society, American College of Cardiology, American Heart Association, American Lung Association, American Public Health Association, and Public Citizen In Support of Petitioner

---

INTERESTS OF *AMICI CURIAE*

The American Cancer Society, American College of Cardiology, American Heart Association, American Lung Association, American Public Health Association, and Public Citizen are non-profit organizations that work to reduce the deadly toll that cigarettes have taken on the American people. Their interests are more fully spelled out in the Addendum to this brief ("Add." 1-2). This brief is filed with the written consent of the parties.

STATEMENT OF THE CASE

This is a product liability action involving claims for personal injury and wrongful death that were caused by long term use of respondents' cigarettes. The issue before the Court is what preemptive effect, if any, the Federal Cigarette Labeling and Advertising Act of 1965, as amended (the "Labeling Act"), 15 U.S.C. §1331, has on petitioner's claims that respondents failed to warn petitioner's decedent of the dangers of smoking, that they engaged in false and misleading advertising concerning the effects of smoking on human health, and that they intentionally embarked on a campaign to negate the effects of the required warning label on cigarette packages and in cigarette advertising.

Early in the litigation, respondents raised the preemptive effect of the Labeling Act as a defense, arguing that Congress's decision to require warning labels precludes the states from allowing a plaintiff in a tort case against a cigarette manufacturer to base a claim on a failure to warn of the dangers of smoking or on false and misleading advertising. In essence, respondents argued that, regardless of what they said or failed to say after 1965 about the connection between their cigarettes and the health of those who smoked them, they were entitled to absolute immunity for that aspect of their conduct. The district court ruled against respondents, but certified the preemption question for interlocutory appeal to the Third Circuit, which reversed. Although the court of appeals found neither express preemption nor that Congress intended to occupy the field related to cigarettes and health, it nonetheless concluded, based largely on the general statements of purposes in the introduction to the Labeling Act, that Congress impliedly preempted not only all failure to warn claims, but also those based on false and misleading advertising. A petition for writ of certiorari from that decision was denied, and the case returned to the district court for discovery and eventual trial.

Of the many rulings made by the lower courts thereafter, the only ones of significance relate to the effect of the prior preemption ruling on the admissibility of evidence concerning what respondents did after the effective date of the Labeling Act (January 1, 1966) and what petitioner's decedent learned after

that date. As to both of these issues, the court of appeals ruled that no post-1965 evidence could be admitted, for or against either side, because to do so would evade its prior preemption ruling. As even respondents admit, the Labeling Act has no effect prior to 1966, and so the evidence which shows what respondents did and did not know about the hazards of smoking prior to 1966 *is* admissable. However, everything that Mrs. Cipollone learned or that respondents did or failed to do after January 1, 1966, must be excluded from the jury because, according to the court of appeals, that is what Congress intended but left unsaid in the Labeling Act.

SUMMARY OF ARGUMENT

The Labeling Act contains a specific preemption provision, 15 U.S.C. § 1334(b), that the Third Circuit, like every other court to consider the issue, correctly found did not apply. While the language in section 1334(b) on which respondents rely -- that the states may not impose any "requirement or prohibition" with respect to the advertising or promotion of cigarettes -- is ambiguous, the legislative history of the Labeling Act makes it clear that this phrase was never intended to include tort claims such as those that petitioner has made here. The absence of any congressional intent to preempt these claims is established by three aspects of that history.

First, there is nothing to suggest that Congress or even the cigarette manufacturers were interested in preempting state common law tort remedies. Indeed, all of the discussion of preemption focused on what the Federal Trade Commission and the states were doing by statutes or regulations to impose affirmative warning requirements on both cigarette packages and in cigarette advertising. There is a vast difference between the imposition of specific, mandatory disclosure requirements, with the almost inevitable conflict among the various entities imposing them, and the common law claims at issue here, which are based on both respondents' failure to warn the public about the dangers of their products and their own affirmative statements which misled Mrs. Cipollone into believing that smoking was safe. The difference is between the means of achieving disclosure, which are forbidden by the Act if they require that particular statements be

made, and the ends of full and honest disclosure, which are not, since respondents were free to comply with New Jersey law *and* federal law by supplementing the information in the existing warnings about the dangers from smoking by whatever means they may choose.

Second, the preemption provisions in the 1965 Act were narrowly construed by the D.C. Circuit in *Banzhaf v. FCC*, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 825 (1969), to apply only to the imposition of affirmative requirements, which plainly do not include state common law tort remedies. Despite this, when Congress modified this provision slightly in 1970, it never expressed any intention to broaden the scope of preemption, let alone to sweep state common law tort actions within its reach.

Third, petitioner's claims are based in part on what respondents chose to say in their own advertisements and in part on what they failed to say in them. Yet, until late 1984, after Mrs. Cipollone had died, Congress itself, as opposed to the Federal Trade Commission, imposed no requirement that cigarette advertisements contain a health warning, nor has it provided an alternative damages remedy to replace the state law claims that respondents assert have been preempted by the Act. Under these circumstances it would be startling indeed if Congress intended to entirely deny the states their ability to assure that their citizens are adequately informed about the health hazards from smoking.

After properly rejecting express preemption and finding no intent to occupy the field, the Third Circuit nonetheless found implied preemption and in doing so it committed two errors. First, as this Court's decision in *California Federal Savings & Loan Ass'n. v. Guerra*, 479 U.S. 272 (1987), makes clear, when Congress has directly expressed its preemption intentions in the language of a statute, the courts may not go beyond that language to find a different preemption balance. Thus, once the Third Circuit concluded that the phrase "requirement or prohibition" did not include state tort law claims, it erred by looking for implied preemption in other parts of the Act. Second, it improperly relied on a general statement of a subsidiary purpose to find implied preemption, and by doing so, it seriously undermined the principal purpose of the Act -- to increase the flow of information to the public about the dangers of smoking.

The industry's preemption defense is even more untenable when directed at petitioner's claim that respondents affirmatively engaged in false and misleading advertising about the dangers from smoking and intentionally sought to negate the effect of the warning labels in an effort to persuade the public that cigarettes were not harmful. While petitioner's failure to warn claim is based on what respondents did not say, but should have said about their cigarettes, the deceptive advertising tort is based on what they deliberately chose to say in order to induce the public to smoke. There is not a word in the Labeling Act or a shred of legislative history that suggests that Congress intended to relieve the tobacco industry of the consequences of its intentionally misleading claims that smoking was not harmful.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED.

The question presented is whether the general obligations that are imposed under state tort law, which require all manufacturers to take reasonable steps to ensure that consumers receive adequate and non-deceptive information about the dangers of their products, are rendered unenforceable for cigarettes by the Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. § 1331 *et seq.*, as amended in 1970 and 1984. In *amici*'s view the preemption issue in this case turns on what Congress did in those three statutes, and, accordingly, this brief focuses on the portions of those statutes and their history which bear on the preemption issue, leaving to the briefs of petitioner and others the more general discussion of the law of preemption. To assist the Court, *amici* have included as an addendum to this brief the original Act, Pub. L. 89-92, 79 Stat. 282 (Add. 3-6), and both the 1970 and 1984 amendments to it: the Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87 (Add. 7-11), and the Comprehensive Smoking Education Act of 1984, Pub. L. 98-

474, 98 Stat. 2200 (Add. 11-18), respectively.[1]

To answer the question of preemption, the Court must look at the statutory language, consider the concerns of Congress that led to its decision to preempt, and examine with care what Congress actually did. As this brief will show, nothing that Congress did or said demonstrates an intent to prevent injured consumers from utilizing their state tort laws to collect damages from cigarette manufacturers who do not provide them with adequate and accurate information concerning the harms from smoking.

A. What The Act And Its Amendments Provide.

In 1965, Congress passed the Labeling Act, which both mandated a federal warning on cigarette packages and allocated between the federal and state governments certain responsibilities and powers regarding warning labels on cigarette packages and advertisements. Its enactment was the result of three forces that are relevant to the preemption issue. First, following the Surgeon General's 1964 Report, there was a strong movement to require the tobacco companies to disclose the health dangers from smoking. Second, the Federal Trade Commission ("FTC") concluded that the absence of detailed health information in cigarette advertisements rendered them false and/or deceptive within the meaning of section 5 of the FTC Act, 15 U.S.C. § 45. *See* 29 Fed. Reg. 8324 (1964). Third, a number of states were considering requiring specific warning labels on cigarette packages and imposing disclosure requirements on cigarette advertising. *See* Hearings Before the Senate Comm. on Commerce on S. 559 and S. 547, 89th Cong., 1st Sess. 39-40 (March 22, 1965); 111 Cong. Rec. 13901 (col. 3)(1965)(remarks of Sen. Moss).

Although the Declaration of Policy in the 1965 Act proclaims an intent "to establish a comprehensive Federal program," section 2 (Add. 3), Congress in fact did far less. The only mandatory duty that it imposed was to require the following label on every package of cigarettes: "Caution: Cigarette Smoking May Be

[1]References in this brief will generally be to the Acts of 1965, 1970, or 1984 and will include references to the U.S. Code section where applicable.

Hazardous to Your Health." Section 4, 15 U.S.C. § 1333 (Add. 4). It did not require nor did it authorize any federal agency to require any disclosures on cigarette advertising. Thus, cigarette advertising, as distinct from cigarette packaging, was left unregulated by the federal government under the 1965 Act. Moreover, since 1965 states and local communities have enacted a wide spectrum of laws regulating tobacco products. These include taxes, minimum age of sale requirements, free sampling restrictions, limitations on smoking in public places, and government sponsored educational programs. Moreover, none of them has sued to enjoin those laws on the theory that Congress intended to preempt them under the Act. *But see* note 10 *infra* at 26.

The narrowness of the federal program is vital to an understanding of the other major aspect of the 1965 Act -- its two-pronged preemption provision which, with minor changes described *infra* at 10-11, remains in effect today. The first prong, contained in subsection 5(a), 15 U.S.C. § 1334(a), provides that "No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package" (Add. 4). That prong is limited to cigarette packages, and does not apply to advertisements or other promotional materials. In addition, it leaves cigarette makers free to make additional disclosures if they so choose; they simply could not be required, by any state or federal agency, to put an additional or different warning on their packages. This provision answered the cigarette companies' principal objection to warning labels: the fear of having different labels mandated by different states on the same package. *See* H.R. Rep. No. 449, 89th Cong., 1st Sess. 4, 9 (1965) ("1965 House Report"), *reprinted in* 1965 U.S. Code Cong. and Admin. News 2350; S. Rep. No. 195, 89th Cong., 1st Sess. 4 (1965) ("1965 Senate Report").

The second preemption provision was subsection 5(b), 15 U.S.C. § 1334(b), which in 1965 provided:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

(Add. 4-5). This subsection applied only to advertising, and it only prohibited efforts to require that a statement, presumably dictated by a federal, state, or local agency, be included in advertisements. Indeed, that is all that the tobacco companies sought. As one spokesman urged, the preemption provision should be amended to "make clear that no Federal, State, or local authority may impose a warning in advertising for cigarettes packaged in conformity with the labeling provision of the act." Statement of Bowman Gray, Chairman of the Board, R.J. Reynolds Tobacco Co., Cigarette Labeling and Advertising, Hearings Before House Comm. on Interstate and Foreign Commerce, 89th Cong., 1st Sess. 281 (April 6, 1965)("1965 House Hearings"); *id.* at 292. Nothing else was preempted in the 1965 Act, and no mention was made of preempting state tort law remedies in either the hearings, the committee reports, or the floor debates. Thus, under the 1965 Act, it seems clear that petitioner's claims would *not* have been expressly preempted since nothing in New Jersey law dictates that a manufacturer is "required" to include a "statement relating to smoking and health" on its packages or in its advertising, which is all that was preempted by subsections 5(a) and (b) of the 1965 Act.

The third part of the 1965 preemption provision, subsection 5(c) (Add. 5), is no longer part of the Act. It limited the power of the FTC to issue trade rules or "to require an affirmative statement in any cigarette advertisement," but under section 10 (Add. 6), even that limitation expired on July 1, 1969. Moreover, nothing in section 5 or elsewhere prevented the FTC from taking action to stop individual companies from engaging in false advertising, just as it had always done. *See* 1965 House Report at 8 ("in other respects the authority of the Federal Trade Commission with respect to false or misleading advertisements of cigarettes is stated to be unaffected"). The FTC, like the states, was simply forbidden from requiring affirmative statements in cigarette advertising about the connection between smoking and health, either through trade rules or otherwise.

Meanwhile, in 1966 the Federal Communications Commission ("FCC") was petitioned to invoke its fairness doctrine to require radio and television stations that carried cigarette advertisements to present public service announcements describing the

adverse health effects of tobacco use. The FCC largely agreed, and the tobacco companies challenged the FCC's ruling, arguing, in part, that the preemption provisions of section 1334 forbade the FCC from imposing such a requirement. In *Banzhaf v. FCC*, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969), the D.C. Circuit rejected that argument. The court's reasoning on this point, rather than its specific holding, is of great importance because it set the stage for what happened -- or more precisely what did not happen -- when Congress reconsidered the preemption issue in 1969:

> Since the Commission's ruling does not require the inclusion of any "statement . . . in the advertising of any cigarettes" but rather directs stations which advertise cigarettes to present "the other side" each week, it does not violate the letter of the Act.
>
> * * *
>
> This *relatively narrow reading* of the Act is not in conflict with its declared objective of protecting commerce and the national economy against "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." Congress patently did not want cigarette manufacturers harassed by *conflicting affirmative requirements* with respect to the content of their advertising.

Id. at 1088, 1090 (emphasis added, footnote omitted). Thus, as construed by the D.C. Circuit, section 5(b) of the 1965 Act preempted only affirmative requirements. The court also noted:

> if we are to adopt [the cigarette manufacturers'] analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression.
>
> * * *
>
> Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation [beside

> affirmative requirements] by other agencies -- much less that it specifically meant to foreclose all such regulation. If it meant to do anything so dramatic, it might reasonably be expected to have said so directly -- especially where it was careful to include a section entitled "Preemption" specifically forbidding designated types of regulatory action.

Id. at 1089 (footnotes omitted). This was the only pre-amendment judicial interpretation of the 1965 preemption provision, and it concluded that Congress did nothing more than eliminate the possibility of specifically mandated affirmative requirements, and that Congress did not intend to deny federal agencies -- and by implication, the states -- the power to impose other disclosure obligations on cigarette manufacturers. It was with this judicial construction as background that Congress revised the Act in 1969.

Shortly before July 1, 1969, when the ban on the FTC's right to impose affirmative advertising requirements for cigarettes was to expire, the agency proposed a warning for all cigarette advertising. 34 Fed. Reg. 7917 (1969). Congress responded with Public Law 91-222, which was signed on April 1, 1970. The basic framework of the 1965 Act was retained, but some changes were made. First, although the warning label for cigarette packages was somewhat strengthened, *see* section 4 of the 1970 Act (Add. 8), Congress still did not either require a warning for cigarette advertisements or establish an affirmative educational program.

Second, in section 7(a), Congress temporarily extended the ban on the FTC's authority to impose a health warning for cigarette advertising, but then left the agency free to require specific warnings in cigarette advertisements, so long as it gave Congress six months advance notice (Add. 9). The 1970 Act did not address the problem of misleading cigarette advertising, nor did it even require the FTC or any other agency to do so. Sections 7(b) and (c) (Add. 9) reiterated Congress' earlier determination in section 5(c) that the Act did not alter the FTC's power to stop false and misleading cigarette advertising (Add. 5). However, Congress did amend the preemption provision in section 1334(b) so that it no longer applied to federal agencies, but only to the states. *See* section 5(b) of 1970 Act (Add. 8-9). Whereas under

the 1965 version of section 1334(b), the FTC could not have required any "statement relating to smoking and health" in cigarette advertisements (not even the federally-mandated label used on cigarette packages), this amendment freed it to do so after July 1, 1971. In fact, when the FTC finally acted, with the industry's consent, it did nothing more than require that all advertisements contain the 1970 package warning label. *See In the Matter of Lorillard*, 80 F.T.C. 455 (1972).

Third, Congress prohibited all advertising of cigarettes "on any medium of electronic communications" after January 1, 1971. Section 6, 15 U.S.C. § 1335 (Add. 9). Once again, the cigarette companies went along, doubtless believing that they were better off with no television and radio advertising than they would be in the post-*Banzhaf* era in which opposing viewpoints would regularly be broadcast to the American public.

Fourth, there were other minor changes in the preemption provision in section 1334(b). In addition to eliminating its applicability to federal agencies, Congress extended it slightly so that it included not only "advertising," but "advertising or promotion" of cigarettes. Moreover, because of the other changes described above, section 5(b) was structured differently from its predecessor by banning any "requirement or prohibition based on smoking and health ... imposed under state law...." There is no indication, however, that the Senate, which made this change, intended the "or prohibition" phrase to have a broad meaning, or to do any more than prevent a state from doing indirectly by a prohibition, that which it could not do directly by a requirement. *See* S. Rep. No. 91-566, 91st Cong., 1st Sess. 12-13 (1969), *reprinted in* 1970 U.S. Code, Cong. & Admin. News 2652 ("1969 Senate Report"). As a result, the 1970 version, which remains intact today as section 1334(b), reads as follows:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

There are two other aspects of the 1970 changes that are worthy of note. First, nothing in the legislative history suggests that revised section 1334(b) was to be significantly different from its predecessor. The 1969 Senate Report summarized the preemption provision as one which "[p]rohibits health-related regulation or prohibition of cigarette advertising by any State or local authority." *Id.* at 1. The three-paragraph discussion of preemption neither mentioned state tort laws, nor suggested any dramatic change. Instead, it stated that the preemption language was included "to avoid the chaos created by a multiplicity of conflicting regulations," *id.* at 12, a concern that is wholly irrelevant to a preemption of petitioner's claims here. Nor did the Conference Report suggest any expansion of the prior preemption provision. H.R. Rep. No. 91-987, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code, Cong. and Admin. News 2676 ("1970 Conf. Report").

Second, this Court declined to review *Banzhaf* on October 13, 1969, when the 1970 Act was pending before the Senate Commerce Committee. Despite the narrow reading that the D.C. Circuit had given section 1334, there is not the slightest hint that Congress wanted to preempt anything other than "affirmative requirements" imposed under state law, which is all that the *Banzhaf* court said was covered. *See* 405 F.2d at 1090. It is particularly significant that the Senate Report specifically mentioned *Banzhaf* and its preemption ruling, yet Congress did nothing to change it. 1969 Senate Report at 7. *See also* H.R. Rep. No. 91-289, 91st Cong., 1st Sess. 3 (1969) (discussion prior to Supreme Court action).[2]

---

[2]The industry has suggested that the phrase "State law" in section 1334(b) indicates that Congress meant to preempt State common law as well as the items encompassed in the more limited alternative phrase "State statute or regulation," which appeared in an earlier draft. There is, however, no evidence that Congress made this change with that interpretation in mind. In fact, the only legislative history on the subject, in addition to that quoted above, states that the phrase was intended to reach "not only action by State statute but all other administrative actions or local ordinances or regulation by any political subdivision of any State," 1969 Senate Report at 12, a list remarkable for the absence of any reference to state courts or the common law. In conference the Senate version was adopted with

(continued)

It is hardly surprising that Congress did not specifically preempt state common law tort remedies in 1970 because no one, including the cigarette makers, ever asked it to do so. Rather, even after *Banzhaf*, they continued to limit their request for preemption to halting any "restriction or ban on cigarette advertising by any Federal, State, or local government [because] otherwise authority over this national matter will pass from the control of Congress with resultant chaos." Hearing Before the Consumer Subcomm. of Senate Comm. on Commerce, on H.R. 6543, 91st Cong., 1st Sess. 80 (July 22, 1969)(Statement of Joseph F. Cullman, III, Chairman, Philip Morris, Inc.). Mr. Cullman also recognized that, even under his proposal, the authority of the FTC (and presumably similar state agencies) "is specifically preserved with respect to unfair or deceptive acts or practices in the advertising of cigarettes," *id.* at 78, which provides further evidence that the breadth of the Act's preemption provisions is not nearly as sweeping as the industry argues. Subsequently (at 102), Mr. Cullman expressed concern about states and localities "[r]equiring different health warnings [and] banning cigarette advertising in a particular locality," concerns that have nothing to do with state common law torts.

Then, in 1984, Congress for the first time required warnings to be placed in advertisements as well as on packages. The fact that Congress finally decided to include advertising disclosure requirements in subsections 4(a)(2) and (3) of the 1984 law (Add. 13-15) supports the conclusion that state tort law claims that cigarette manufacturers violated their duty to warn or engaged in false and misleading advertising prior to 1984 were not preempted since, until then, there was no Congressionally-mandated warning for cigarette advertisements.

"minor technical changes." 1970 Conf. Rep. at 5 (Amend. 3). By contrast, the definition of "State law" in ERISA that is used in its expansive preemption provision, specifically includes "decision" and "other State action having the effect of law." 29 U.S.C. § 1144(c)(1), discussed in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482-83 (1990).

B. The Act Did Not Preempt State Tort Laws That Have The Effect Of Requiring That Cigarette Manufacturers Provide Consumers an Adequate Warning.

1. The Analytic Framework.

There are two kinds of preemption: express and implied. In none of the five federal appeals court decisions finding preemption under the Labeling Act have the courts found express preemption.[3] Indeed, the Third Circuit's ruling here, which was followed by the courts in *Stephen*, *Palmer*, *Roysdon*, and *Pennington*, specifically held that the Labelling Act did *not* expressly preempt state tort remedies. 789 F.2d at 185-86; 825 F.2d at 313; 849 F.2d at 234; 876 F.2d at 418. But in relying on implied preemption, when Congress had provided for a limited, express preemption in section 1334, the courts acted contrary to the teachings of this Court's preemption decision in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

At issue in *California Federal* was whether Title VII of the Civil Rights Act preempted California's pregnancy leave statute. The holding -- that there was no preemption in that case -- is not significant here; what is important is that the Court based its analysis on the express preemptive language that Congress used in the statute (or, as Justice Scalia described them, "*anti-preemption* provisions," *id.* at 295, emphasis in original), not on implications from the rest of Title VII. As Justice Marshall explained for the majority, "there is no need to infer congressional intent to preempt state laws" because Congress stated its intention in two separate parts of the Civil Rights Act. *Id.* at 282. Similarly, in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), the Court refused to embark on an implied preemption analysis in interpreting the Coastal Zone Management Act. As Justice O'Connor wrote for the Court:

---

[3] *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Roysdon v. R.J. Reynolds Co.*, 849 F.2d 230 (6th Cir. 1988); *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989).

> Congress has provided several clear statements of its intent regarding the pre-emptive effect of the CZMA; those statements, which indicate that Congress clearly intended the CZMA *not* to be an independent cause of preemption except in cases of actual conflict, end our inquiry. *Id.* at 591 (emphasis in original).

This Court's refusal to wander into the largely uncharted and speculative waters of implied preemption makes eminent sense, because, as is universally recognized, the issue of preemption is decided by ascertaining congressional intent, *see e.g. California Federal*, *supra* at 689, and cases cited there. As the Minnesota Court of Appeals observed in *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W. 2d 691, 696 (1988), *aff'd in part, rev'd in part*, 437 N.W. 2d 655 (Minn. 1989):

> There is no more reliable indication of what Congress intended to preempt on a given subject than what it expressly preempted in the statute. It is one thing for courts to try to divine congressional intent from the overall operation of a statute and its legislative history when Congress has been silent, but it is quite another to do so when Congress has included specific provisions, as it did in 15 U.S.C. § 1334, expressly addressing what it intended to preempt.

Not only do such quests for congressional intent of implied preemption involve enormous commitments of judicial resources, but they force courts to engage in the kind of speculative balancing of interests which they claim Congress engaged in, but somehow left out of the express preemption portion of the statute. Such a process inevitably thrusts courts into a quasi-legislative role of finding the appropriate "balance" among competing interests, *see Palmer*, *supra*, 825 F.2d at 626, a role for which there is no justification when Congress has spoken on the subject. Or, as this Court recently observed, "The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia University Hospi-*

tals, Inc. v. Casey, 111 S. Ct. 1138, 1147 (1991).[4]

Congress plainly and expressly stated its intent in 15 U.S.C. § 1334, a section that it entitled "Preemption." That section, interpreted in light of the remainder of the Act and its legislative history, should be the sole focus of the Court's inquiry. Because all of the courts that have found preemption have gone beyond the express preemption section, they committed error.[5]

2. There Is No Express Preemption.

To find express preemption, the cigarette companies must show that a common law tort action based on a duty to warn is a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes. . . ," as that phrase is used in section 1334(b). We do not argue that, simply because the state remedy is one for money damages, it could never be preempted by a federal statute. Nor do we argue that in no circumstances could the terms "requirement or prohibition" be construed to mandate preemption of tort remedies. We only argue that, for the reasons set forth below, such a construction is wholly unwarranted under this statutory scheme, a conclusion also reached by the Third Circuit here. 789 F.2d at 185-86.

---

[4]The issue of whether to imply preemption is similar to the issue of whether to imply a private cause of action, based on a federal statute. *See Thompson v. Thompson*, 484 U.S. 174 (1988). The single most important distinction between this case and the implied causes of action cases is that here Congress has already spoken by creating a limited express preemption defense, and the issue is whether it intended to go further, but failed to do so by neglect. While there may be reasons to go beyond the face of a statute when Congress has been silent, there is no reason to do it (and every reason not) when Congress has spoken directly to the issue.

[5]The only case in this Court that *amici* have discovered in which the Court found implied preemption, after rejecting express preemption, is *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), but the argument raised here was neither briefed there, nor discussed in the opinion. In *Ingersoll Rand*, *supra*, the Court relied on an implied conflict preemption argument as well as a finding of express preemption. Three Justices relied only on the conflict.

In our view, the best way to understand what Congress meant by "requirements or prohibitions" is to trace through the language used by it first in the 1965 and then in the 1970 amendments. This history shows that Congress meant to include only those state laws that imposed mandatory duties on the cigarette companies, and no more. The 1965 language could not possibly bear any other meaning (Add. 6), and there is no indication that Congress intended to expand the preemption provisions when they were modified slightly in 1970. Perhaps most significantly of all, the D.C. Circuit had narrowly construed the 1965 provision in 1968, Congress was specifically aware of that ruling, and it never considered broadening that provision, undoubtedly because the industry never asked it to do so. Under these circumstances, the proper interpretation of section 1334(b) is that it does not include state tort claims such as petitioner's.

Another way to analyze section 1334(b) is to consider what kinds of state laws are preempted by it and to ask whether the concerns which motivated Congress in those paradigm situations also apply to state tort claims. There can be no doubt that, if New Jersey passed a statute requiring all cigarette ads to state that "Cigarette Smoking Causes Death From Cancer, Heart Disease, and Emphysema," it would be an unenforceable "requirement" under section 1334(b). Nor could New Jersey achieve that goal by the backdoor method of prohibiting all cigarette ads unless they contained that warning. It was the possibility of multiple, mandatory state warning requirements, which cigarette companies could not satisfy without producing separate ads and separate packages for each state, that led to inclusion of the preemption section in the 1965 Act. *Banzhaf*, *supra*, 405 F.2d at 1090.

By contrast, state tort law operates quite differently. It does not tell a manufacturer that it must do this, or that it may not do that. A manufacturer of a hazardous product has a duty to warn its customers, but the choice of how that warning will be conveyed is up to each individual producer. Stated another way, the state sets the goals, and the company chooses the means to achieve them. Among those means are package inserts, public service advertisements, and general educational programs on the connection between smoking and its dangers to health. The distinction

between means and ends is hardly an academic one, but has important consequences in the real world of commerce and in assessing the need for federal preemption.[6] Thus, it is simply not the case that a decision rejecting the preemption defense would require cigarette manufacturers to use a warning different from those mandated by Congress. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)(rejecting preemption, based on claims of "incidental regulatory effects," and noting that "[a]ppellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation").

The goal of New Jersey tort law is adequate disclosure, and there is nothing in the Labeling Act to the contrary. In fact, the Labeling Act is designed to enhance, not cut off, information flow, even if the means available to do so are partially limited. If New York or North Carolina have different goals than New Jersey -- either greater or lesser disclosure -- the differences between the states create no problems for the cigarette companies because a producer can comply with all by meeting the standards of the most stringent. It is only when the state seeks to dictate the means, generally by "requiring" or "prohibiting" specific conduct or specific statements, that the potential for conflict arises.

Not only does the line between means and ends help explain the difference between a "requirement," which is forbidden, and a general duty to warn, which is not, but the legislative history of the Act reflected only a concern with conflicts in the former, not in the latter. In particular, the 1970 congressional reenactment and amendment of the Labeling Act, in the face of the narrow reading given the prior version in *Banzhaf*, 405 F.2d at 1090, supports this limited reach of the term "requirement or prohibition." There is nothing in the history of the 1970 Act that suggests that Congress meant anything more by the term "prohibition" than the converse of a "requirement," *i.e.*, to prevent indirect as

---

[6]This distinction is similar to that between a regulation intended to achieve a particular performance level, and one which established the means or the design of the equipment by which the regulatory goal is to be met. *See* S. Breyer, *Regulation and Its Reform* 105 (Harv. Univ. 1982).

well as direct impositions of mandatory standards, or, as the 1969 Senate Report noted, to prevent states from prohibiting all cigarette advertising. *See* p. 12, *supra*. In the face of this history, which the industry has generally sidestepped by never citing *Banzhaf*, the conclusion is overwhelming that Congress did not intend to expand the narrow scope of the preemption provision of the original section 1334(b) when it reenacted it, in slightly modified form, in 1970. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580 (1978)("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change").

Finally, section 1334(b) should not be interpreted to apply to common law torts because the industry never asked Congress for that protection, and Congress never considered giving it to them. As this Court recently observed in an analogous context, "the fact that Congress did not even *consider* the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction [over RICO claims]." *Tafflin v. Levitt*, 110 S. Ct. 792, 796 (1990) (emphasis in original); *id.* at 800-803 (Scalia and Kennedy, concurring on ground that divestiture should be based solely on express provision in statute). In short, while section 1334(b) recognizes certain legitimate claims that the cigarette companies have in avoiding multiple, conflicting obligations, it in no way supports the broad preemption urged by the industry, as every court to consider it has held.

3. There Is No Implied Preemption.

As explained above, once express preemption is found wanting, the Court's inquiry should be at an end, unless it is actually impossible to comply with both state and federal law. Nonetheless, all of the courts that have found preemption have based their rulings on the doctrine of implied preemption, relying principally on the Declaration of Policy in section 1331. In order for respondents to establish implied preemption, they must show that permitting this lawsuit to proceed would frustrate the goals of the Labeling Act. The most complete response to this argument is contained in the opinion of the Texas Court of Appeals, Third District, in *Carlisle v. Philip Morris, Inc.*, 805 S.W. 2d 498, 509-517

(1990). *Amici* will not repeat those arguments, but simply supplement them.

At the outset, it is vital to recall that Congress had two goals in mind in the Act. The first and principal goal, which is set forth in section 2(1) of the 1965 Act (Add. 4), is that the public be "adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes." As the 1965 House Report stated (at 1), the "Principal Purpose of the bill is to provide adequate warning to the public of the potential hazards of cigarette smoking . . .." Thus, this goal of informing consumers of the dangers of smoking -- the 1965 statute was named the "Cigarette Labeling and Advertising Act," the 1970 Act was called the "Public Health Cigarette Smoking Act," and the 1984 law was denominated the "Comprehensive Smoking Education Act" -- must be considered in any implied preemption calculus.[7]

First, there is no basis for a claim that Congress thought that the package warning was adequate to convey all the information that consumers might need. That very claim was rejected in *Banzhaf*, where the court found "no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking." 405 F.2d at 1090.

Second, Congress' declaration that it intended to provide some protection to the tobacco industry is substantially qualified. Thus, it was the stated policy under section 1331(2) that "com-

---

[7]One indication that Congress did not pay much attention to the precise language in the declaration of its purpose is that when it strengthened the label in 1970, it left the very weak "may be hazardous" language in that declaration. It did amend the declaration in 1984 to include a reference to the newly imposed requirements for advertisements, see section 6(a), but even then the declaration referred only to "any adverse health effects of cigarette smoking" (Add. 21), although the new rotational labels are clear in their assertion of a direct causal connection between smoking and adverse health effects. *See* section 4(a) (Add. 16-17). Furthermore, the original Senate bill did not contain any of these declarations of purpose, thereby suggesting that they were not intended to have the central role found by the court of appeals. *See* 1965 Senate Report.

merce and the national economy may be (A) protected to the maximum extent consistent with this declared policy [of informing consumers about the hazards of smoking]." But the problem that the preemption provision was designed to remedy is specified in subsection 1331(2)(B) as "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." What is important about this phrase is the limited nature of the concerns expressed -- "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." Insofar as Congress was concerned about *labeling*, there is no doubt that section 1334(a) provides full protection from all of these expressed concerns. And for *advertising*, the problems expressed there are limited to regulations (presumably both state and federal) that are "diverse, nonuniform [the difference between them is not clear], and confusing." The elimination of "confusing" regulations or laws is hardly a matter needing federal preemption, since that should be a goal at all levels of government. As for the other concerns, they are no more than the fear, legitimate but limited, about inconsistent affirmative requirements, that could be satisfied only by producing different packages or advertisements for different states, a concern which was specifically identified in the legislative history as being the basis for federal preemption. *See* pp. 7-8, 11-13, *supra*. Beyond these specific concerns, there is nothing to indicate that Congress wanted to ensure continued high levels of cigarette sales; it simply did not want conflicting state warning requirements to interfere with interstate commerce in cigarettes.

Despite the quite narrow language in section 1331, and the fact that it is merely a statement of purpose and not an operative part of the Act, the Third Circuit relied on it because it "reveals that the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy. *See Banzhaf*, 405 F.2d at 1090." 789 F.2d at 187. Reading sections 1331 and 1334 together, the court concluded "that this balance would be upset by either a requirement of a warning other than that prescribed in section 1333 [dealing with package labeling] *or* a requirement or prohibition based on smoking and health with respect to the advertising or promotion of cigarettes. See 15

U.S.C. § 1334." *Id.* (emphasis in original). The court accepted the industry's assertion that "state common law damage actions have the effect of requirements that are capable of creating 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* It then held that "the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising or promotion of cigarettes," including any claim that "necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages . . . ." *Id.* (footnote omitted).

Two fundamental errors pervade the Third Circuit's approach. First, it finds a careful overall balance where there is none. Indeed, the very case that it cites for this proposition, *Banzhaf v. FCC*, reached precisely the opposite conclusion when it permitted the FCC to increase the flow of information, which is precisely what the Third Circuit said was impermissible. While Congress forbade the states from altering the contents of the warning label or imposing affirmative warnings in cigarette advertising, it did so in response to the narrow problem of avoiding directly conflicting obligations, which is plainly not the problem here. Particularly since Congress included a specific preemption provision in section 1334, it was wholly inappropriate for the Third Circuit to have, in effect, added a new subsection to it. That is a job for Congress, not the courts. *See Banzhaf, supra*, 405 F.2d at 1089.

The second error of the court of appeals is that it apparently assumed that the duties under state law could only have been met by altering the warning label on the package and that the Act itself imposes "advertising and promotion obligations" -- neither of which is correct. Respondents had other means of complying with New Jersey law in order to advise Mrs. Cipollone of the hazards of smoking. *See* p. 17, *supra*. None of them involved altering the federal package warning label, and none of them would have resulted in a violation of advertising or promotion requirements imposed by Congress, since there were none until after Mrs. Cipollone died, although in 1972 the FTC and the industry agreed

that thereafter cigarette advertisements would contain the warning label used on cigarette packages. While some state tort law claims, in some other schemes, may impermissibly tip the balance and harm a protected federal interest, the result of Third Circuit's ruling is to protect the pocketbooks of the cigarette makers by insulating them from all state tort law claims for failing to warn of the dangers of smoking.

In *Palmer, supra*, the First Circuit accepted a variation on this theme by suggesting that it was "inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps a single jury in a single state." 825 F.2d. at 626. According to *Palmer* and the cigarette makers, this sweeping preemption was intended even though Congress never required any warning whatsoever in cigarette advertising until 1984. While some federal statutes may so thoroughly regulate an activity that there is no room left for states to act, Congress did not occupy the field in the Labeling Act, a conclusion that is underscored by the specific, but limited express preemption provisions in section 1334.

In our view, the legislative history of the three acts, and in particular the failure to alter the rationale and result in *Banzhaf*, conclusively show that Congress made no judgment that all other federal and state efforts to increase the flow of information about the dangers of smoking were forbidden. It simply set a floor on mandating labeling information, and decided that congressionally imposed advertising warnings were not justified until 1984. *See* 1965 House Report at 5; 1965 Senate Report at 5. Unless the states overstep the specific limits imposed by section 1334, they are free to employ their general tort laws to reduce the terrible toll from smoking -- a goal wholly consistent with that of the Labeling Act.

C. Congress Did Not Preempt the States From Redressing Injuries Caused by False and Misleading Advertising.

In addition to contending that respondents failed to provide enough information, petitioner claims that respondents affirma-

tively misled the public in general, and Mrs. Cipollone in particular, into believing that their cigarettes were safe. Unlike the inadequate warning claim, in which petitioner argues that respondents said too little, this claim charges that they said too much, *i.e.*, that their advertising claims were false and misleading and/or that the intended effect of their advertising was to negate the mandatory warning labels on the packages and, after 1972, in their ads. Despite the significant difference between these two claims, industry briefs in these cases rarely mention the false advertising claim, and almost never analyze the scope of preemption as applied to it.[8]

The one appellate court to focus on the special nature of a claim based on false and misleading advertising held that such a claim is not preempted by the Act. *Forster*, *supra*, 437 N.W.2d at 661-62. The Minnesota Supreme Court specifically distinguished this claim from one based on failure to warn since this tort "is based on a duty to tell the truth, not a duty to warn"; since it is based on "the falsity of what the cigarette manufacturer has chosen to say," not what it has failed to say; and since any conflict with the Act "is indirect and self-imposed by the cigarette manufacturer." *Id.* at 662.

> To find in this situation an implied preemption, we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health.
>
> Indeed, it is clear Congress did not intend cigarette advertisers to be free to engage in deceitful advertising practices because it expressly provided in the Act for the Federal Trade Commission to act in such instances. Section 5(b) of the 1965 Act. *Cf. Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). *Id.*

---

[8]In both 1965 and 1969 the Senate expressed concern that the effect of cigarette advertising might be to negate the warning labels, but made it clear that the FTC could proceed against such ads as unfair or deceptive acts or practices. *See* 1965 Senate Report at 6; 1969 Senate Report at 8.

The clearest proof of the weakness of the assertion that false advertising claims are also preempted is that Congress did nothing in 1965 and 1970 to regulate the content of cigarette advertising; it simply mandated warning labels on cigarette packages. Everything else about the advertising practices of the cigarette makers was left up to them, at least until 1972, when the FTC consent order required that warnings also be placed in their ads. In essence, respondents' position leads to the conclusion that Congress, which took no action on cigarette advertising until 1984, intended to make the states powerless, by any means whatsoever, to control even the most patently misleading cigarette ads, no matter how little the FTC chose to do under its general powers to police misleading advertisements. There is simply no basis for inferring that Congress intended to confer on the cigarette companies a license to deceive. *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (no intent to preempt field that Congress has left unregulated).[9]

Once again, history fortifies our position. As noted above, the D.C. Circuit in *Banzhaf* was faced with a similar preemption claim relating to the FCC's jurisdiction under the fairness doctrine, and the court soundly rejected that attempt to keep the public in the dark about the dangers of smoking:

> Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation [beyond placing warnings on packages] by other agencies -- much less that it specifically meant to foreclose all such regulation.

405 F.2d at 1089. Faced with this ruling, which it specifically noted, Congress reenacted substantially the same preemption language in section 1334(b), hardly what would be expected if it

---

[9]Under our analysis, states could also impose monetary penalties or obtain injunctions against misleading claims in cigarette advertising, as well as use their tort law to control such practices. Just as with the duty to warn, the means chosen by the state to exercise its regulatory authority is rarely the touchstone to preemption, and it is not the case here either.

wanted to change the result in *Banzhaf* and deny states the power to control deceptive cigarette advertising.

Furthermore, *Banzhaf*'s interpretation--that section 1334(b) is limited to preemption of "affirmative requirements"--was the foundation for the 1970 reenactment. The fact that this section remained basically unchanged suggests that the phrase "requirement or prohibition" in the 1970 version was meant to continue the narrow scope of the preemption provision, especially in the absence of any indication that Congress intended to broaden it. *See Lorillard v. Pons*, *supra*. Under no conceivable reading could a ban on states imposing "affirmative requirements" be considered to preclude a remedy for violating a state rule forbidding false and misleading advertising, where the violator chose the terms of the unlawful advertisement itself. While the term "prohibition," standing on its own, might be read to reach such a case, there is no reason to believe that Congress intended it to be so all-encompassing here. Rather, the history of the preemption provision shows that it was only intended to prevent states from imposing differing, affirmative obligations on cigarette makers, and there is no hint that the traditional power of the states to police false and misleading advertising, and to offer redress to consumers injured by it, was being eliminated just because the product was a cigarette.[10]

The fallacy in the industry's position can also be seen by taking an example involving a cigarette ad from the 1930s, bringing it into the Labeling Act era, and applying this analysis to a state law claim based on it. The FTC found that R.J. Reynolds advertised that

---

[10]Indeed, the manufacturer in *Forster* went so far as to suggest to the Minnesota Supreme Court (Br. 25) that if Minnesota passed a law banning all sales of cigarettes (or even all sales to persons under age 14, or to women who are pregnant), the existence of the warning label would preclude Minnesota from enforcing that law. Similarly, in *Kyte v. Philip Morris Inc.*, 408 Mass. 162, 556 N.E.2d 1025 (1990), the company argued that the Labeling Act preempted a claim that its promotional campaign, which was directed at selling cigarettes to children, who were forbidden by state law from purchasing them, resulted in teenagers becoming addicted to cigarettes. Because the majority found that the complaint did not state a claim for relief under Massachusetts law, it did not reach the preemption issue.

"the wind and physical condition of athletes will not be impaired by the smoking of Camel cigarettes, as many as one likes . . . and that the smoking of Camels is not disadvantageous to breathing capacity during an athletic contest." *In the Matter of R.J. Reynolds Tobacco Company*, 46 F.T.C. 706, 720 (1950). The Commission found these claims to be "false, deceptive, and misleading," *id.* at 727-28, and ordered the company to cease and desist from making them. *Id.* at 733. It is undisputed that nothing in any version of the Labeling Act would have prevented the FTC from bringing an action against Reynolds or any other company that made such claims. Yet by the industry's logic, if a person had relied on those claims, and was injured as a result of them, for example, by losing his job on a professional athletic team, his state tort law claims based on false and deceptive advertising would be preempted. There is, we submit, not a word in the Act or a shred of legislative history to suggest that Congress intended such a bizarre result, but that is precisely where respondents' arguments inevitably lead.

At various times, the industry has suggested that it would be unfair to hold companies liable under state tort law for complying with federal requirements. Whatever force that argument may have on the duty to warn claim -- and we think it is has none in light of the various alternatives available to them for providing this information -- it vanishes entirely on the false advertising claim. Thus, it is surely not unfair to require a cigarette maker to answer for the deliberate excesses of its advertisements, which were designed to sell its products. If petitioner can prove that respondents' ads were false and misleading, that they caused Mrs. Cipollone to believe that the cigarettes she smoked were safe, and that smoking them resulted in her death, the Labeling Act was not intended to relieve respondents from their common law tort liability for the injuries they caused, particularly since Congress gave their victims no alternative federal remedy. *See Silkwood v. Kerr-McGee Corp.*, 484 U.S. 238, 251 (1984). In balancing the interests of cigarette makers, who deceived consumers into believing that their products were safe, and consumers, who believed the ads and who died because they trusted them and continued smoking, Congress did not intend to give the manufacturers a blanket tort immunity for their deceptive practices. Yet stripped of all the legal niceties, that is the essence of the industry's preemption claim.

* * *

There is one final point that is applicable to both claims. When Congress passed the 1984 amendments to the Labeling Act, the preemption issue was just beginning to be litigated. In fact, shortly before the 1984 Act became law, the district court in this case rejected the defense. *See* Pet. App. 109a. But in 1986, after the preemption issue had gained public prominence, but before the Third Circuit's decision in this case, Congress addressed this issue in a bill that had an identical purpose as the Labeling Act, the Comprehensive Smokeless Tobacco Health Education Act of 1986, Public Law 99-252, 100 Stat. 30, 15 U.S.C. § 4401. Like the 1984 Labeling Act for cigarettes, this law required warning labels for smokeless tobacco products for both packages and advertisements, and it outlawed radio and television advertising. Section 7 of that Act deals with preemption in three subsections. While there are some differences between the first two of these provisions and subsections 1334(a) and (b), they are basically the same as those in the Labeling Act. On the other hand, the final provision answers the question for smokeless tobacco that is at issue for cigarettes in this case: "(c) Effect on Liability Law. -- Nothing in this Act shall relieve any person from liability at common law or under state statutory law to any other person."

The industry has argued that this provision shows that Congress knows how to avoid preemption of state tort law when it wants to do so. In our view, however, this provision sends an entirely different message: as soon as Congress became aware that manufacturers of dangerous products were claiming that federal laws, designed principally to educate consumers about these dangers, were being used to defeat state common law claims for damages caused by these dangerous products, it acted to prevent that kind of misuse of federal law. Although Congress did not speak directly on this question in 1984 for tobacco used in cigarettes, it did so in 1986 for tobacco used in smokeless products. Having decisively rejected tort law preemption for smokeless tobacco products, there is no reason to believe that Congress "intended" to treat tobacco used in cigarettes any differently, but failed to say so.

CONCLUSION

The judgment of the court of appeals upholding respondents' claim of preemption should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)

David C. Vladeck
Cornish F. Hitchcock

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amici* American Cancer Society, American College of Cardiology, American Heart Association, American Lung Association, American Public Health Association, and Public Citizen

May 23, 1991

INTEREST OF AMICI

The American Cancer Society is the world's largest voluntary health organization. Its membership consists of 2.3 million volunteers, including over 50,000 physicians. The Society has 58 divisions and 3,400 unit organizations located in every state in the United States. The Society's sole purpose is the control and elimination of cancer through research, education, and service. In 1986 it supported more than $80 million in cancer-related research. Research supported by the Society has played an important role in the identification of cigarette smoking as a major cause of cancer in the United States. The Society devotes a substantial portion of its educational funds to better and more effectively informing the American public about the relationship between cancer and smoking.

The American College of Cardiology is an 18,000 member non-profit professional medical society and teaching institution whose purpose is to foster optimal cardiovascular care and disease prevention through professional education, promotion of research, and leadership in the development of standards and formulation of health care policy. The College is a strong advocate of efforts to reduce the incidence of heart disease due to cigarette smoking.

The American Heart Association is this nation's second largest voluntary health organization whose mission is to reduce disability and death from cardiovascular diseases and stroke, this nations number one cause of death. Cigarette smoking has been identified as a major risk factor for cardiovascular disease. A smoker's risk of heart attack is more than twice that of a nonsmoker. Cigarette smoking is the biggest risk factor for sudden cardiac death (a risk that is two to four times higher than that of a nonsmoker), and the biggest risk factor for peripheral vascular disease. Because of this, the Heart Association devotes a portion of its resources to research and educational efforts aimed at reducing cigarette smoking. Each year 3.2 million volunteers actively work in over 2,000 state and local divisions across the country to carry out the Heart Association's mission.

The American Lung Association is this nation's oldest voluntary health organization, with 144 associations in all 50 states.

Originally established in 1904 to reduce the incidence of tuberculosis, the Association broadened its work many years ago to address the full range of issues concerning the prevention, control, and cure of lung disease, through community education, professional programs, and the support of pulmonary research and professional education on both the national and local levels. The Lung Association has over 150,000 volunteers, including most of the nation's leading pulmonary physicians who belong to its medical section, the American Thoracic Society. Since cigarette smoking is the major cause of chronic obstructive pulmonary disease, including emphysema and chronic bronchitis, the Lung Association devotes a substantial portion of its resources to research and education efforts about the relationship between smoking and lung disease.

The American Public Health Association, founded in 1872, is the oldest and largest professiona! public health society in the world, with combined national and affiliate membership of over 50,000 health professionals. Its members include physicians, dentists, nurses, social workers, and other health professionals, as well as academics and researchers specializing in public health matters. The Association publishes the American Journal of Public Health, a monthly peer review journal widely recognized in the field. The Association works to promote the health of the American people by advancing the availability of health services, encouraging a safe and healthy environment, launching public health education programs, and publishing numerous materials reflecting developments in public health. For many years, it has engaged in public education projects emphasizing the health hazards of smoking, which it has determined to be the number one preventable health hazard, as to both mortality and morbidity.

Public Citizen is a non-profit, public interest organization with approximately 105,000 members. Principally through its Health Research Group, it has worked to increase public knowledge about the health hazards of smoking, to calculate and publicize the economic costs of smoking, and to obtain more rational smoking policies in hospitals and workplaces. It was also instrumental in calling the public's attention to the dangers from smokeless tobacco and in persuading Congress to pass the Comprehensive Smokeless Tobacco Health Education Act of 1986.

STATUTORY ADDENDUM

Federal Cigarette Labeling and Advertising Act

Public Law 89-92 (July 27, 1965)

DECLARATION OF POLICY

SEC. 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

DEFINITIONS

SEC. 3. As used in this Act--

(1) The term "cigarette" means--

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term "commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston

Island and any place outside thereof; (B) commerce between points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

LABELING

SEC. 4. It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

PREEMPTION

SEC. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which

are labeled in conformity with the provisions of this Act.

(c) Except as is otherwise provided in subsections (a) and (b), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

(d)(1) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) current information on the health consequences of smoking and (B) such recommendations for legislation as he may deem appropriate.

(2) The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

CRIMINAL PENALTY

SEC. 6. Any person who violates the provisions of this Act shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.

INJUNCTION PROCEEDINGS

SEC. 7. The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this Act upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

CIGARETTES FOR EXPORT

SEC. 8. Packages of cigarettes manufactured, imported, or

packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this Act, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

SEPARABILITY

SEC. 9. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the other provisions of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

TERMINATION OF PROVISIONS AFFECTING REGULATION OF ADVERTISING

SEC. 10. The provisions of this Act which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of enactment of this Act.

EFFECTIVE DATE

Sec. 11. This Act shall take effect on January 1, 1966.

Public Health Cigarette Smoking Act of 1969

Public Law 91-222 (April 1, 1970)

SEC. 2. Sections 2 through 10 of Public Law 89-92 (15 U.S.C. 1331-1338) are amended to read as follows:

"DECLARATION OF POLICY

"SEC. 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

"(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

"(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

"DEFINITIONS

"SEC. 3. As used in this Act--

"(1) The term 'cigarette' means--

"(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

"(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

"(2) The term 'commerce' means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island and any place outside thereof; (B) commerce between

points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

"(3) The term 'United States', when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island. The term 'State' includes any political division of any State.

"(4) The term 'package' means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

"(5) The term 'person' means an individual, partnership, corporation, or any other business or legal entity.

"(6) The term 'sale or distribution' includes sampling or any other distribution not for sale.

"LABELING

"SEC. 4. It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: 'Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health'. Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

"PREEMPTION

"SEC. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

"(b) No requirement or prohibition based on smoking and

health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

"UNLAWFUL ADVERTISEMENTS

"SEC. 6. After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

"FEDERAL TRADE COMMISSION

"SEC. 7. (a) The Federal Trade Commission shall not take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising. If at any time on or after July 1, 1971, the Federal Trade Commission determines it is necessary to take action with respect to such pending trade regulation rule proceeding, it shall notify the Congress of the determination. Such notification shall include the text of the trade regulation rule and a full statement of the basis for such determination. No trade regulation rule adopted in such proceeding may take effect until six months after the Commission has notified the Congress of the text of such rule, in order that the Congress may act if it so desires.

"(b) Except as provided in subsection (a), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

"(c) Nothing in this Act shall be construed to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

"REPORTS

"SEC. 8. (a) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) current informa-

tion in the health consequences of smoking, and (B) such recommendations for legislation as he may deem appropriate.

"(b) The Federal Trade Commission shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

"CRIMINAL PENALTY

"SEC. 9. Any person who violates the provisions of this Act shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.

"INJUNCTION PROCEEDINGS

"SEC. 10. The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this Act upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

"CIGARETTES FOR EXPORT

"SEC. 11. Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this Act, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

"SEPARABILITY

"SEC. 12. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the other provisions of this Act and the application of such provision to other

persons or circumstances shall not be affected thereby."

SEC. 3. Section 5 of the amendment made by this Act shall take effect as of July 1, 1969. Section 4 of the amendment made by this Act shall take effect on the first day of the seventh calendar month which begins after the date of the enactment of this Act. All other provisions of the amendment made by this Act except where otherwise specified shall take effect on January 1, 1970.

Comprehensive Smoking Education Act

Public Law 98-474 (October 12, 1984)

SHORT TITLE

SECTION 1. This Act may be cited as the "Comprehensive Smoking Education Act".

PURPOSE

SEC. 2. It is the purpose of this Act to provide a new strategy for making Americans more aware of any adverse health effects of smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking.

SMOKING RESEARCH, EDUCATION, AND INFORMATION

SEC. 3. (a) The Secretary of Health and Human Services (hereinafter in this section referred to as the "Secretary") shall establish and carry out a program to inform the public of any

dangers to human health presented by cigarette smoking. In carrying out such program, the Secretary shall--

(1) conduct and support research on the effect of cigarette smoking on human health and develop materials for informing the public of such effect;

(2) coordinate all research and educational programs and other activities within the Department of Health and Human Services (hereinafter in this section referred to as the "Department") which relate to the effect of cigarette smoking on human health and coordinate, through the Interagency Committee on Smoking and Health (established under subsection (b)), such activities with similar activities of other Federal agencies and of private agencies;

(3) establish and maintain a liaison with appropriate private entities, other Federal agencies, and State and local public agencies respecting activities relating to the effect of cigarette smoking on human health;

(4) collect, analyze, and disseminate (through publications, bibliographies, and otherwise) information, studies, and other data relating to the effect of cigarette smoking on human health, and develop standards, criteria, and methodologies for improved information programs related to smoking and health;

(5) compile and make available information on State and local laws relating to the use and consumption of cigarettes; and

(6) undertake any other additional information and research activities which the Secretary determines necessary and appropriate to carry out this section.

(b)(1) To carry out the activities described in paragraphs (2) and (3) of subsection (a) there is established an Interagency Committee on Smoking and Health. The Committee shall be composed of--

(A) members appointed by the Secretary from appropriate institutes and agencies of the Department, which may include the National Cancer Institute, the National Heart, Lung, and Blood Institute, the National Institute of Child Health and Human Development, the National Institute on Drug Abuse, the Health Resources and Services Administration, and the Centers for Disease Control;

(B) at least one member appointed from the Federal Trade

Commission, the Department of Education, the Department of Labor, and any other Federal agency designated by the Secretary, the appointment of whom shall be made by the head of the entity from which the member is appointed; and

(C) five members appointed by the Secretary from physicians and scientists who represent private entities involved in informing the public about the health effects of smoking.

The Secretary shall designate the chairman of the Committee.

(2) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the manner provided by sections 5702 and 5703 of title 5 of the United States Code.

(3) The Secretary shall make available to the Committee such staff, information, and other assistance as it may require to carry out its activities effectively.

(c) The Secretary shall transmit a report to Congress not later than January 1, 1985, and biennially thereafter which shall contain--

(1) an overview and assessment of Federal activities undertaken to inform the public of the health consequences of smoking and the extent of public knowledge of such consequences,

(2) a description of the Secretary's and Committee's activities under subsection (a),

(3) information regarding the activities of the private sector taken in response to the effects of smoking on health, and

(4) such recommendations as the Secretary may consider appropriate.

LABELS FOR CIGARETTES AND CIGARETTE ADVERTISING

SEC. 4. (a) Section 4 of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1333) is amended to read as follows:

"LABELING

"SEC. 4. (a)(1) It shall be unlawful for any person to manufac-

ture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

"SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

"SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

"SURGEON GENERAL'S WARNING: Smoking By Pregnant Women may Result in Fetal Injury, Premature Birth, And Low Birth Weight.

"SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

"(2) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised (other than through the use of outdoor billboards) within the United States any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

"SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

"SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

"SURGEON GENERAL'S WARNING: Smoking By Pregnant Women may Result in Fetal Injury, Premature Birth, And Low Birth Weight.

"SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

"(3) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised within the United States through the use of outdoor billboards any cigarette unless the advertising bears, in accordance with the requirements of this section one, of the following labels:

"SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, And Emphysema.

"SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Health Risks.

"SURGEON GENERAL'S WARNING: Pregnant Women

Who Smoke Risk Fetal Injury And Premature Birth.

"SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

"(b)(1) Each label statement required by paragraph (1) of subsection (a) shall be located in the place label statements were placed on cigarette packages as of the date of the enactment of this subsection. The phrase 'Surgeon General's Warning' shall appear in capital letters and the size of all other letters in the label shall be the same as the size of such letters as of such date of enactment. All the letters in the label shall appear in conspicuous and legible type in contrast by typography, layout, or color with all other printed material on the package.

"(2) The format of each label statement required by paragraph (2) of subsection (a) shall be the format required for label statements in cigarette advertising as of the date of the enactment of this subsection, except that the phrase 'Surgeon General's Warning' shall appear in capital letters, the area of the rectangle enclosing the label shall be 50 per centum larger in size with a corresponding increase in the size of the type in the label, the width of the rule forming the border around the label shall be twice that in effect on such date, and the label may be placed at a distance from the outer edge of the advertisement which is one-half the distance permitted on such date. Each label statement shall appear in conspicuous and legible type in contrast by typography, layout, or color with all other printed material in the advertisement.

"(3) The format and type style of each label statement required by paragraph (3) of subsection (a) shall be the format and type style required in outdoor billboard advertising as of the date of the enactment of this subsection. Each such label statement shall be in printed capital letters of the height of the tallest letter in a label statement on outdoor advertising of the same dimension on such date of enactment. Each such label statement shall be enclosed by a black border which is located within the perimeter of the format required in outdoor billboard advertising of the same dimension on such date of enactment and the width of which is twice the width of the vertical element of any letter in the label statement within the border.

"(c) The label statements specified in paragraphs (1), (2), and

(3) of subsection (a) shall be rotated by each manufacturer or importer of cigarettes quarterly in alternating sequence on packages of each brand of cigarettes manufactured by the manufacturer or importer and in the advertisements for each such brand of cigarettes in accordance with a plan submitted by the manufacturer or importer and approved by the Federal Trade Commission. The Federal Trade Commission shall approve a plan submitted by a manufacturer or importer of cigarettes which will provide the rotation required by this subsection and which assures that all of the labels required by paragraphs (1), (2), and (3) will be displayed by the manufacturer or importer at the same time.

"(d) Subsection (a) does not apply to a distributor or a retailer of cigarettes who does not manufacture, package, or import cigarettes for sale or distribution within the United States.".

(b) The amendment made by subsection (a) shall take effect upon the expiration of a one-year period beginning on the date of the enactment of this Act.

CIGARETTE INGREDIENTS

SEC. 5. (a) The Federal Cigarette Labeling and Advertising Act is amended by redesignating sections 7 through 12 as sections 8 through 13, respectively, and by inserting after section 6 the following new section:

"CIGARETTE INGREDIENTS

"SEC. 7. (a) Each person who manufactures, packages, or imports cigarettes shall annually provide the Secretary with a list of the ingredients added to tobacco in the manufacture of cigarettes which does not identify the company which uses the ingredients or the brand of cigarettes which contain the ingredients. A person or group of persons required to provide a list by this subsection may designate an individual or entity to provide the list required by this subsection.

"(b)(1) At such times as the Secretary considers appropriate, the Secretary shall transmit to the Congress a report, based on the

information provided under subsection (a), respecting--

"(A) a summary of research activities and proposed research activities on the health effects of ingredients added to tobacco in the manufacture of cigarettes and the findings of such research;

"(B) information pertaining to any such ingredient which in the judgment of the Secretary poses a health risk to cigarette smokers; and

"(C) any other information which the Secretary determines to be in the public interest.

"(2)(A) Any information provided to the Secretary under subsection (a) shall be treated as trade secret or confidential information subject to section 552(b)(4) of title 5, United States Code and section 1905 of title 18, United States Code, and shall not be revealed, except as provided in paragraph (1), to any person other than those authorized by the Secretary in carrying out their official duties under this section.

"(B) Subparagraph (A) does not authorize the withholding of a list provided under subsection (a) from any duly authorized subcommittee or committee of the Congress. If a subcommittee or committee of the Congress requests the Secretary to provide it such a list, the Secretary shall make the list available to the subcommittee or committee and shall, at the same time, notify in writing the person who provided the list of such request.

"(C) The Secretary shall establish written procedures to assure the confidentiality of information provided under subsection (a). Such procedures shall include the designation of a duly authorized agent to serve as custodian of such information. The agent--

"(i) shall take physical possession of the information and, when not in use by a person authorized to have access to such information, shall store it in a locked cabinet or file, and

"(ii) shall maintain a complete record of any person who inspects or uses the information.

Such procedures shall require that any person permitted access to the information shall be instructed in writing not to disclose the information to anyone who is not entitled to have access to the information.".

(b) Section 7 of the Federal Cigarette Labeling and Advertising Act added by subsection (a) shall take effect upon the

expiration of the one-year period beginning on the date of the enactment of this Act.

MISCELLANEOUS AMENDMENTS

SEC. 6. (a) Paragraph (1) of section 2 of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1331) is amended to read as follows:

"(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and".

(b) Section 3 of such Act (15 U.S.C. 1332) is amended by adding at the end the following:

"(8) The term 'Secretary' means the Secretary of Health and Human Services.".

(c) Section 8 of such Act (15 U.S.C. 1336) (as so redesignated) is amended to read as follows:

"FEDERAL TRADE COMMISSION

"SEC. 8. Nothing in this Act (other than the requirements of section 4(b)) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.".

(d) Section 9 of such Act (15 U.S.C. 1337) (as so redesignated) is amended--

(1) by striking out "of Health, Education, and Welfare" in subsection (a),

(2) by redesignating clauses (A) and (B) in such subsection as clauses (1) and (2), respectively,

(3) by striking out clause (A) in subsection (b) and by redesignating clauses (B) and (C) as clauses (1) and (2), respectively.